# Message Text

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ACTION DLOS-06

INFO OCT-01 ISO-00 SS-15 L-03 INR-07 NEA-10 EB-07 IO-13

OES-06 PM-04 SAL-01 SP-02 /075 W
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R 062014Z AUG 76
FM USMISSION USUN NEW YORK
TO SECSTATE WASHDC 8527

S E C R E T SECTION 1 OF 2 USUN 3130

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FOR T - MR. MAW

L - MR. LEIGH FROM OXMAN

E.O. 11652: GDS
TAGS: PLOS
SUBJECT: LOS: ISRAEL AND STRAIT OF TIRAN

1. FOLLOWING POINTS MAY BE OF INTEREST TO YOU IN CONSIDERING PROBLEM. TO THE EXTENT MULTILATERAL TREATY BEARS UPON U.S. POSITIONS:

A. U.S. CURRENTLY RECOGNIZES 3-MILE TERRITORIAL SEA. AS PARTY TO 1958 TERRITORIAL SEA CONVENTION, U.S. THEREFORE RECOGNIZES NON-SUSPENDABLE INNOCENT PASSAGE AS REGIME IN TIRAN EVEN IF, AS IN CURRENT U.S. VIEW, THERE ARE HIGH IN GULF OF AQABA. AS PARTY TO THAT CONVENTION AND CHICAGO CONVENTION, ANY ASSERTION OF RIGHT OF OVERFLIGHT OF TIRAN WOULD HAVE TO DERIVE FROM SEPARATE PRIN-CILPES OF CUSTOMARY LAW, IF ANY, PURSUANT TO ARTICLE 1(2) OF TERR-ITORIAL SEA CONVENTION. (I AM NOT AWARE OF ANY, BUT SEA PARA. 2(C) BELOW).

B. RSNT ARTICLE 43 APPLIES NON-SUSPENDABLE INNOCENT PASSAGE TO STRAITS CONNECTING HIGH SEAS TO TERRITORIAL SEA. THUS, WHILE THIS TYPE OF STRAIT IS NOW DISTINGUISHED FROM HIGH SEAS TO HIGH SEA TRANSIT PASSAGE STRAIT REGIME (WHICH WAS NOT THE CASE IN THE TERRITORIAL SEA CONVENTION), JURIDICAL RESULT FOR TIRAN IS THE SAME
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(IN FACT BETTER: SEE C BELOW).

C. INNOCENT PASSAGE REGIME IS DENFINITELY BETTER IN RSNT THAN IN 1958 CONVENTION FROM NAVIGATION POINT OF VIEW. (1) RSNT 18(2) IS ALL NEW. A GOOD ARGUMENT CAN BE MADE THAT 18(2) IS EXHAUSTIVE, PARTICULARLY BECAUSE OF CATCH-ALL IN 18(2)(1). IN ANY EVENT, EVEN IF ILLUSTRATIVE, EVERYTHING IN THE LIST IS GEARED TO SPECIFIC ACTIONS OF THE SHIP, NOT THE GENERAL INNOCENCE OF THE FLAG STATE. THE CHAPEAU IS PARTICULARLY USEFUL IN THIS REGARD. (2) ALL BUT THE FIRST SENTENCE OF ARTICLE 23(1) IS NEW. 23(1)(B) IS PARTICULARLY RELEVANT.

D. ARGUMENT THAT U.S. DOES NOT DISTINGUISH BETWEEN TYPES OF STRAITS IS CONCEPTUAL AND NOT TRUE IN PRACTICAL TERMS. IN OUR VIEW, THE CURRENT RELEVANT REGIME IN ALL MAJOR HIGH SEAS TO HIGH SEAS STRAITS EXCEPT SINGAPORE (AND, ARGUABLY, DANISH AND TURK-ISH STRAITS, BUT THERE ARESPECIAL TREATIES THERE) IS FREEDOM OF NAVIGATION AND OVERFLIGHT BEYOND 3 MILES; THEY ARE ALL WIDER THAN 6 MILES, THIS, U.S.
DOES NOT REPEAT NOT HAVE TO TAKE LIBERAL VIEW OF TIRAN REGIME NOW TO PROTECT ITS MAJOR STRAITS INTERESTS BY ANALOGY, ALTHOUGH, OF COURSE, SUCH A VIEW IS A USEFUL ARGUMENT IN THE ALTERNATIVE..

E. ARGUMENT THAT DISTRICTION BETWEEN ARTICLE 36 AND ARTICLE 43 STRAITS IS SPECIFIC DISCRIMINATION AGAINST ISRAEL IS UNTRUE; NOT ONLY JORDAN, BUT THE U.S. (EASTPORT, MAINE) AND FRG (KADETT CHANNEL) ARE
AFFECTED; IRAQ ARGUABLY IS ALSO AFFECTED. (TURKEY'S CASE IS PROBABLY MORE CORRECTLY VIEWED AS COVERED BY ARTICLE 37(2), SECOND SENTENCED).

F. ARABS DID NOT REPEAT NOT RATIFY 1958 TERRITORIAL SEA CONVEN-TION BECAUSE IT APPLIED NON-SUSPENSION RULE TO HIGH SEAS TO TERRITORIAL SEA STRAITS. THEY OPPOSE NON-SUSPENSION RULE HERE BUT, IF IT STAYS IN AND CONVENTION REMAINS A SINGLE PACKAGE, SOME AT LEAST MAY RATIFY TO PROTECT OTHER INTERESTS (E.G., THEY SUSPECT, PROBABLY INCORRECTLY, THAT DEEP SEABEDS MAY ULTIMATELY CONTAIN COMMERCIALLY EXPLOITABLE HYDROCARBONS AND IN ANY EVENT,WOULD HAVE PROBLEMS LEAVING SEABED AUTHORITY WITHOUT ARAB
PARTICIPATION).

G. WE OPPOSE REFERRING TO NAVIGATION IN ANY PROVISION ON ENCLOSED AND SEMI-ENCLOSED SEAS FOR TWO REASONS. FIRST, IT WILL
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ENCOURAGE VIEW THAT COASTAL STATES CAN COLLECTIVELY EXERCISE GREATER RIGHTS OVER THIRD STATES THAN IN THE OPEN OCEAN (SOVIET PUBLICITIS AND

THE SHAH OF IRAN ARE FLIRTING WITH THIS CONCEPT). SECONDLY, MAJO-RITY OF OUR LDC SUPPORTERS ON STRAITS (INCLUDING SOME ARABS) BORDER SEMI-
ENCLOSED SEAS. IF THEIR TRANSIT RIGHTS WERE SEPARATELY AND SPECIALLY GUARANTEED, THEY NO LONGER NEED TO SUPPORT UNIVERSAL TRANSIT RIGHTS.

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H. IN CONCEPT, THE PRINCIPLE THAT NO STATE CAN EXTEND ITS TERRITORIAL SEA SO AS TO CUT OFF THE TERRITORIAL SEA OF ANOTHER STATE FROM THE HIGH SEAS IS SOUND. THIS IS THE RULE WHEN INTERNAL WATERS ARE EXTENDED BY DRAWING STRAIGTH BASELINES, EVEN THOUGH THERE IS A RIGHT OF INNOCENT PASSAGE IN SUCH INTERNAL WATERS (TERRITORIAL SEA CONVENTION, ARTICLE 4(5); REPEATED IN RSNT, ARTICLE 6(6)). I SUSPECT RULE

WAS NOT APPLIED TO THE TERRITORIAL SEA IN 1958 BECAUSE THE U.S. AND OTHERS WHO WOULD BE CONCERNED WERE NOT CONSIDERING AGREEMENT ON A WIDER LIMIT THAN 3 MILES UNTIL THE VERY END.IF WE TRY TO INSERT THE RULE IN THE RSNT WITH RESPECT TO THE TERRITORIAL SEA NOW, WE COULD PLAY IT AS A PRO-FRG/TURKEY POSITION, BUT THE ARABS WOULD STILL CATCH US.

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ACTION DLOS-06

INFO OCT-01 ISO-00 SS-15 L-03 INR-07 NEA-10 EB-07 IO-13

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R 062014Z AUG 76
FM USMISSION USUN NEW YORK
TO SECSTATE WASHDC 8528

S E C R E T SECTION 2 OF 2 USUN 3130

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FOR T - MR. MAW
L - MR. LEIGH FROM OXMAN

2. FROM THE ABOVE, I REACH THE FOLLOWING CONCLUSIONS:

A. THE ONLY MAJOR STRAIT IN THE WORLD WHERE AN INNOCENT PASSAGE REGIME NOW APPLIES IN OUR VIEW AND WILL BE SUPERSEDED BY A FREE TRANSIT REGIME IS SINGAPORE. IN THAT CASE, SINGAPORE DESIRED THIS RESULT. WE (BUT NOT JAPAN AND THE USSR) WERE PREPARED TO CONCEDE ON EXCEPTION TO FREE TRANSIT FOR ALL STRAITS NARROWER THAN 6 MILES.

B. ISRAEL IS NO WORSE OFF UNDER RSNT THAN NOW. IN FACT, THE SUBSTANCE IS BETTER, THERE IS A REAL CHANCE OF FORCING SOME ARABS INTO RATIFICATION, AND A NEW TREATY WOULD BE MORE WIDELY ACCEPTED AS LAW BY LDC'S, WHETHER OR NOT THEY RATIFY.

C. TO THE EXTENT THAT ISRAEL PERCEIVES AN INCONSISTENCY BETWEEN US. COMMITMENTS OR SECRUITY COUNCIL DECISIONS AND THE RSNT, THERE IS THE SAME INCONSISTENCY WITH THE TERRITORIAL SEA CONVENTION. THIS WOULD ONLY CHANGE IF THE MOST RECENT SINAI-RELATED COMMITMENT ON OVERFLIGHT IS PROPERLY CONSTRUED TO INCLUDE TIRAN, WHICH DOES NOT SEEM TO BE THE CASE EVEN IF (AS NOW) WE BELIEVE THERE ARE HIGH SEAS IN THE GULF. EVEN THEN, IT DOES NOT MEAN THE LOS CONFERENCE IS THE PLACE TO ACT.

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D. I HAVE LITTLE PROBLEM WITH MAINTAINING THAT GENERAL PRINCIPLES OF INTERNATIONAL LAW REQUIRE SPEICAL COOPERATION (AGREEMENT) IN

IMPLEMENTING RIGHTS IN MARITIME SPACES LIKE AQABA AND THE AEGEAN. RSNT

ARTICLE 130 FIRST SENTENCE, ARGUABLY SAYS THIS DESPITE SECOND SENTENCE. THE STRONGEST ARGUMENT IS THAT AUTOMATIC APPLICATION OF UNIVERSAL RULES PRODUCES SOME MANIFEST SPECIAL PROBLEMS. IF WE BASE THIS ON CUSTOMARY LAW, THERE IS NO NEED FOR A TREATY AMENDMENT. IN THIS SENSE, IF WE WISH TO DO SO, WE COULD CONTINUE TO REGARD AQABA AS "INTERNATIONAL WATERS. NOTE THAT U.S. -CANADA MARITIME BOUNDARY IN JUAN DE FUCA CONTAINS SIMULTANEOUS AGREEMENT ON RECIPROCAL NAVIGATION RIGHTS. SIMILAR PRECEDENTS ON SIMULTANEOUS AGREEMENT DOUBTLESSLY EXIST IN CASE OF RIVERS. THESE CAN BE REGARDED AS PRECEDENTS FOR

DEALING WITH PRACTICAL PROBLEMS OF DIVIDING CONFINED WATER SPACES BETWEEN SEVERAL STATES. CHILE - ARGENTINA TREATY ON STRAIT OF MAGELLAN CAN BE VIEWED IN THIS LIGHT AS WELL.

E. THE ISRAELIS WILL BE LUCKY IF ARTICLE 43 SURVIVES; THE ARABS FORMALLY OPPOSE IT, BUT HAVE NOT LOBBIED MUCH. I SEE NO REPEAT NO CHANCE OF THE ARABS AGREEING TO FREE TRANSIT IN FORM OR EFFECT FOR TIRAN. TRYING TO FORCE THE ISSUE WILL EITHER (A) DESTROY FREE TRANSIT IN ALL STRAITS OR (B) RESULT IN A COMPLETE VOTING VICTORY FOR THE ARABS ON TIRAN; EITHER IS LIKELY TO TERMINATE POSSIBILITY OF A TREATY FOR THE U.S.

F. THE ISRAELIS ARE CRAZY TO THROW AWAY FREE TRANSIT OF GIBRALTER AND BAB-EL-MANDEB FOR TIRAN, SINCE THEY ARE UNLIKELY TO WITHDRAW VOLUNTARILY FROM SHARM-EL-SHEIKH UNTIL AND UNLESS THEY GET ADEQUATE LOCAL AGREEMENT
(AND POSSIBLY BIG POWER GUARANTEES) ON TIRAN. SUCH AGREEMENT CAN, OF COURSE, GO BEYOND INNOCENT PASSAGE. THEY COMPLETELY DISREGARD THE POLI-

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TICAL COSTS TO THE U.S. OF OVERFLYING GIBRALTAR AGAINST SPAIN'S WILL WITHOUT A MULTILATERAL CONVENTION TO BACK US UP (POLITICALLY, EVEN IF SPAIN DOES NOT RATIFY).

G. NOTHING IN THE TERRITORIAL SEA CONVENTION OR THE RSNT PREVENTS THE U.S. FROM BACKING BROADER TRANSIT RIGHTS IN TIRAN IN A MIDDLE EAST AGREEMENT.

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3. EVEN UNDER RSNT, 12-MILE TERRITORIAL SEA IS MERELY A MAXIMUM. I HAVE SOMETIMES WONDERED WHY THE ISRAELIS DO NOT EVENTUALLY PULL BACK THEIR TERRITORIAL SEA TO LESS THAN 3 MILES IN THE GULF, AND IN THE REMAINDER OF "THEIR" AREA OF THE TRIANGLE FORMED BY EQUIDISTANCE LINES, MERELY CLAIM RESOURCES AND A CONTIGUOUS ZONE, LITERALLY CREATING HIGH SEAS IN THE GULF. ARTICLE 12(1), FIRST SENTENCE, OF TERRITORIAL SEA CONVENTION (AND RSNT ARTICLE 14) LIMITS JORDAN AND EGYPT TO EQUI-DISTANCE EVEN IS THERE IS NO TERRITORIAL SEA ON THE OTHER SIDE, WHICH OF COURSE, IS THE ONLY SENSIBLE RESULT. IF WE ARE IN A SECOND SENTENCE SITUATION, IT MAKES NO DIFFERENCE WHAT THE ISRAELI CLAIM IS. NEEDLESS TO SAY, SHOULD ISRAEL TRY THIS BEFORE THE LOS TREATY IS CONCLUDED , THEY SERIOUSLY IMPAIR THE CHANGES OF GETTING A GOOD TREATY IS CONCLUDED, THEY SERIOUSLY IMPAIR THE CHANGES OF GETTING A GOOD TREATY. THUS, ASIDE FROM SOME RELUCTANCE TO COMMIT US TO SUPPORT SUCH UNANTICIPATED, IF TECHNICALLY LEGAL, LEGERDEMAIN, MY CONCERN ABOUT MENTIONING THIS TO THEM IS THAT THEY MIGHT TALK OR ACT TOO FAST.
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